Supreme Court, U.S.
FILED
JUN 5 2000
CLERK

(2)

No. 99-1933

In The

Supreme Court of the United States

WENDY J. AHRENS,

Petitioner,

v.

PEROT SYSTEMS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARGARET WUESTE LESESNE
Counsel of Record for Respondent
JENNIFER BURR ALTABEF
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 855-3000
Telecopier: (214) 855-1333

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18pp

QUESTION PRESENTED

A plaintiff sued third parties, alleging that they interfered with and ultimately caused the termination of her employment with her employer. In the lawsuit against the third parties, plaintiff supported a motion to remand with testimony that her relationship with her employer was positive and untarnished until the interference of the third parties. The lawsuit against the third parties was then remanded to state court. After remand, the plaintiff filed suit against her employer, asserting that she was terminated for discriminatory reasons, as evidenced by alleged discriminatory comments made before her termination. Is the plaintiff judicially estopped from bringing the discrimination lawsuit against her former employer?

DISCLOSURE PURSUANT TO RULE 29.6

The petition for writ of certiorari accurately lists the parties to the proceeding. There is no parent corporation of respondent Perot Systems Corporation and no publicly-held company owns 10% or more of Perot Systems Corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

DISCLOSURE PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

ARGUMENT 2

I. The Decisions of the Courts Below Are Correct .. 2

II. Petitioner's Attacks on the Decisions Below Are Without Merit 4

A. The decisions below do not conflict with *Cleveland v. Policy Management Systems Corporation* 4

B. The decisions below do not conflict with *Price Waterhouse v. Hopkins* 8

C. The decisions below are consistent with other judicial estoppel cases 10

D. The decisions below did not depart from the usual course of judicial proceedings 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Cleveland v. Policy Management Systems Corporation, 526 U.S. 795 (1999) 4, 5, 6, 7

Mitchell v. Fruehauf Corp., 568 F.3d 1139 (5th Cir. 1978) 10, 11

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 8

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000) 10

Spinosa v. International Harvester Company, 621 F.2d 1154 (1st Cir. 1980) 11

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 9, 10

STATEMENT OF THE CASE

The critical facts and procedural background are undisputed and are accurately set forth in the opinions of the court of appeals and district court. *Ahrens v. Perot Systems Corporation*, 205 F.3d 831 (5th Cir. 2000); 39 F. Supp.2d 773 (N.D. Tex. 1999). In contrast, petitioner's statement of the case omits or obscures several critical and indisputable facts:

1) Petitioner filed a lawsuit against defendants wholly unrelated to respondent (the "Tortious Interference Lawsuit"), in which she took the position that prior to the interference of third parties, her employment relationship with respondent was entirely positive, and that it was the interference of the third parties that caused her employment relationship with respondent to deteriorate and ultimately to be terminated.

2) While the Tortious Interference Lawsuit was still ongoing, petitioner filed this lawsuit against respondent, in which she took the position that she had been terminated because she was a woman and because she was perceived to be disabled, and testified to numerous instances of alleged discriminatory conduct that occurred long before her employment was terminated.

3) Petitioner testified in this lawsuit that her female supervisor made numerous remarks to her that are "direct evidence" of discriminatory animus, during the year preceding the termination of petitioner's employment with respondent. Therefore, at the time she

> *filed the* Tortious Interference Lawsuit, petitioner knew about most of the incidents that she alleges support her claims of discrimination. This is directly contrary to the suggestion in her petition that she only became aware of the alleged discriminatory animus after the termination of her employment.

In light of these critical facts, the rulings of the courts below were not just correct, but were entirely consistent with the Court's prior holdings.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. The Decisions of the Courts Below Are Correct.

As the courts below correctly determined, petitioner is precluded from pursuing her discrimination claims against respondent under the common law doctrine of judicial estoppel. In the Tortious Interference Lawsuit, petitioner claimed that her termination from respondent was the result of tortious interference of the unrelated parties, and the court relied upon petitioner's sworn statements in the Tortious Interference Lawsuit that her "good" employment relationship with respondent was destroyed because of the tortious interference of third parties.

In this lawsuit, petitioner took the inconsistent position that she was terminated because of her sex and because respondent perceived her to be disabled. In support of her claims of discrimination, petitioner cited comments she attributed to her female supervisor (the sole

person responsible for deciding to terminate petitioner's employment) and comments made by others employed at respondent. The comments petitioner attributed to her female supervisor allegedly were made, with one exception, months before petitioner was terminated from respondent. The other comment allegedly was made during the meeting in which petitioner was informed her employment was being terminated. Almost all of the comments petitioner attributes to other management employees at respondent in support of her discrimination claims also allegedly were made prior to petitioner's termination. All of these alleged comments were made prior to petitioner's testimony in the Tortious Interference Lawsuit that her relationship with respondent was good until the third parties interfered.

In the courts below, petitioner argued that these comments pre-dating her termination are direct evidence of discriminatory animus, for which no inference is necessary in order to conclude they demonstrate a discriminatory animus. According to petitioner's own allegations, she was well aware of the alleged discriminatory animus long before she filed either the Tortious Interference Lawsuit or this lawsuit. Therefore, the courts below properly held that, because petitioner's factual assertions and position in the Tortious Interference Lawsuit were relied upon by the court in the Tortious Interference Lawsuit, her contradictory factual assertions and position in this lawsuit were subject to the bar of judicial estoppel, and petitioner could not proceed with this case.

II. Petitioner's Attacks on the Decisions Below Are Without Merit.

Petitioner makes four arguments, all calculated to suggest that the courts below misapplied the relevant law and that, as a result, she has been unjustly deprived of the benefit of the anti-discrimination statutes at issue in this case. Each of petitioner's arguments fails because the courts below properly applied the law to this case and acted in conformity with the usual course of judicial proceedings.

A. The decisions below do not conflict with *Cleveland v. Policy Management Systems Corporation.*

Petitioner first argues that the determination that her claims against respondent were legally barred because of judicial estoppel is in conflict with this Court's opinion in *Cleveland v. Policy Management Systems Corporation,* 526 U.S. 795 (1999). Petitioner's assertions are incorrect, because the facts in her case are readily distinguished from those in *Cleveland.*

In *Cleveland,* this Court considered the limited question of whether an individual who has represented to the Social Security Administration ("SSA") that she is disabled and unable to work (and is then granted benefits under the Social Security Disability Insurance ("SSDI") program based upon that representation) is judicially estopped from bringing a lawsuit against her former employer under the Americans With Disabilities A ("ADA"). In an action under the ADA, the individual asserted that she could have performed the essential

functions of her job if the employer had provided her with reasonable accommodations. The Fifth Circuit Court of Appeals in *Cleveland* had held that an ADA plaintiff's representation to the Social Security Administration that she was totally disabled created a rebuttable presumption sufficient to judicially estop her later representation that "for the time in question," with reasonable accommodation, she could perform the essential functions of her job. *Id.* at 802. This Court disagreed, holding that in an application for SSDI, an individual is representing that he or she meets the SSA's technical definition of disabled, which requires a far simpler analysis than that required to determine whether an individual meets the ADA's more complex definition of a qualified individual with a disability. *Id.* at 803-4. Therefore, the two assertions (that the applicant for SSDI is totally disabled and that the ADA plaintiff could perform the essential functions of her job if provided reasonable accommodations) could in certain situations "comfortably exist side-by-side." *Id.* at 802-3.

This Court did not hold in *Cleveland* that an individual who stated on an application for SSDI that he or she was totally disabled could never be judicially estopped from later claiming that he or she was entitled to the protection of the ADA because he or she could perform the essential functions of his or her job. Rather, this Court disagreed with the Fifth Circuit Court of Appeals' holding that in such a case a judicial negative presumption should result, and therefore an individual who claimed to be totally disabled as defined by the SSA could not, as a matter of law, later bring a case under the ADA. *Id.* This Court, in fact, noted that there may well be circumstances

in which an individual who claimed to be totally disabled on an application for benefits to the SSA and who received such benefits could be judicially estopped from also bringing a case under the ADA. *Id.* at 805-6.

This Court explained that the particular statements at issue in *Cleveland* were not "directly conflicting statements about purely factual matters such as 'the light was red/green' or 'I can/cannot raise my arm above my head.' " *Id.* at 802. As this Court noted, a representation of total disability on an application for SSDI differs from a "purely factual statement" because it often implies a "context-related legal conclusion" that the applicant is "disabled for purposes of the Social Security Act." *Id.* In contrast to the *Cleveland* situation, petitioner's conflicting statements in the Tortious Interference Lawsuit and this lawsuit are purely factual statements implying no legal conclusions. In the Tortious Interference Lawsuit, petitioner stated that her employment relationship with respondent was good until third parties disparaged petitioner to respondent and asked respondent to terminate her. (Petition Appendix A at 34-35). These statements do not imply legal conclusions. They are assertions of fact, plain and simple.

In addition, the statements petitioner made in this case that contradict her prior sworn statements in the Tortious Interference Lawsuit do not imply legal conclusions. In this lawsuit petitioner swore that she was terminated by respondent because of her gender and/or because respondent perceived her to be disabled. These statements are factual assertions which petitioner supported with her own sworn testimony about comments she attributed to her supervisor and others at respondent

in her effort to show that she was terminated because she was a woman and/or because she was perceived to be disabled.

Petitioner argues that, just as in *Cleveland* where this Court noted that a claim of total disability under the SSA's definition and a claim that an individual could perform the essential functions of her job could co-exist, multiple reasons for petitioner's termination from respondent could also co-exist. That hypothetical situation did not occur in either of petitioner's cases. While it is true that multiple reasons could exist for petitioner's termination from respondent, petitioner overlooks the fact that she chose to pursue two completely separate remedies for the same harm at the same time by swearing to facts that were diametrically opposed.

Petitioner's claims in the Tortious Interference Lawsuit are contradictory to her claims in this lawsuit. In the Tortious Interference Lawsuit, petitioner swore that her relationship with respondent was entirely positive until third parties interfered, disparaged her, and sought to have respondent terminate her. In this lawsuit, petitioner reversed her position and swore that her relationship with respondent had been marred by discriminatory animus (of which she claims she was aware) since 1993. These two positions cannot be reconciled. Either her relationship with respondent was entirely positive until third parties interfered and brought about her termination, or she was subjected to discriminatory treatment (and actually aware of the discriminatory animus) for a number of years prior to her termination. These two fact patterns cannot co-exist and could not have been presented to a jury together. Therefore, petitioner filed two separate

lawsuits in order to pursue recoveries under two irreconcilable factual theories, which the Fifth Circuit properly held was legally barred by judicial estoppel.

B. The decisions below do not conflict with *Price Waterhouse v. Hopkins*.

Petitioner next argues that the Fifth Circuit's decision somehow suggests that an individual's termination cannot be caused by more than one factor, and therefore conflicts with this Court's plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Fifth Circuit did not hold that petitioner could not allege that more than one factor lead to her termination from respondent, as petitioner claims. Rather, the Fifth Circuit held that petitioner could not take two inconsistent positions with regard to the circumstances of her employment and termination. Petitioner had testified at her deposition in the Tortious Interference Lawsuit in response to the question "Why were you terminated from [respondent]" that "I was terminated because . . . [a third party] tort[i]ously interfered with my employment contract." (Petition Appendix A at 35). Petitioner later testified in her deposition in this lawsuit in response to the identical question, "I was terminated from [respondent] because of my sex; Female; that women weren't given the opportunity to be successful at [respondent] that men would be; and that because of the fact that I was considered damaged goods or handicapped and unable to provide value to the company." (Petition Appendix A at 37).

The Fifth Circuit agreed with petitioner that she was not required to prove that either tortious interference or

discrimination was the sole cause of discharge. (Petition Appendix A at 37). Rather, the Fifth Circuit explained that it would not accept petitioner's attempt to reconcile the inherent inconsistencies in her positions in the two different lawsuits, rejecting her explanation that she was never asked for the "sole" reason for her termination. The Fifth Circuit held that petitioner gave "glaringly inconsistent, all-encompassing, non-qualified" responses in each case to the identical question about the reason for her termination. (Petition Appendix A at 38). The fact that the word "sole" was never used did not convince the Fifth Circuit that petitioner's contradictory testimony was excused because petitioner was asked open-ended questions. (Petition Appendix A at 38). Petitioner's employment relationship with respondent could not be good, as she claimed in the Tortious Interference Lawsuit, and riddled with discrimination for years, as she claimed in this lawsuit. The two factual situations described by petitioner could not exist side-by-side. The Fifth Circuit did not hold that a party could never allege that the two reasons stated could both be cause for termination, but rather that petitioner's use of two separate lawsuits to pursue these two separate recoveries, and failure to qualify her positions as potentially including other reasons for termination, were precisely the types of inconsistent positions judicial estoppel is intended to prevent, in order to preserve the integrity of the courts.

Neither this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), nor the Fifth Circuit's holding create a double standard, as alleged by petitioner. If an employer were to attempt to advance two irreconcilable reasons for an employee's termination in to

separate lawsuits, judicial estoppel would be appropriate. This Court has never held that an employer "can literally lie to the judge and jury about the true motives for a discharge, without necessarily suffering an adverse ruling" as petitioner claims. (Petition at 9). *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508-11 (1993). Rather, as this Court recently clarified in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), a plaintiff may actually, in certain circumstances, avoid judgment as a matter of law if an employer's proffered reason for termination is proven false. As the Fifth Circuit correctly held, petitioner's case against respondent was barred because she had previously testified to facts that were inconsistent with the discrimination claims she tried to bring in this case. The Fifth Circuit never held that petitioner would have been precluded from claiming that there were multiple reasons for her termination.

C. The decisions below are consistent with other judicial estoppel cases.

Petitioner next argues that the Fifth Circuit's opinion is in conflict with two specific cases which did not involve the doctrine of judicial estoppel. In the first case, the Fifth Circuit addressed whether pleadings filed in one lawsuit were admissible at the trial of a later lawsuit because they were inconsistent with the assertions in the later lawsuit. *Mitchell v. Fruehauf Corp.*, 568 F.3d 1139 (5th Cir. 1978). In *Mitchell*, a driver injured in an automobile accident first sued the other driver and the owner of the other vehicle for negligence, and then later brought a lawsuit against the manufacturer of the other vehicles alleging that a design defect caused the accident. *Id.* at

1141, 1147. The Fifth Circuit held that the two positions held by the plaintiff – that negligent driving and maintenance caused the accident, and that a design defect caused the accident – were not inconsistent because unforeseeable misuse, not negligence, is a defense to a claim based on product liability. *Id.* at 1147.

In *Spinosa v. International Harvester Company*, the First Circuit also held that a negligence claim against one defendant was not inconsistent with a product liability claim against a different defendant. 621 F.2d 1154, 1157 (1st Cir. 1980). In both cases petitioner cites, of course, there is no discussion of factual assertions that cannot be reconciled. Rather, the courts were considering whether there could be multiple causes for an automobile accident. In this case, the question before the Fifth Circuit was never whether there could be multiple causes for petitioner's termination (no one disputes that it is possible for more than one reason to be the cause of a termination), but whether the facts she asserted in the Tortious Interference Lawsuit – that her employment relationship with respondent was good until third parties interfered – were consistent with her factual assertions in this lawsuit that for years she had been told she was the subject of discriminatory animus and that she indeed was the subject of discriminatory animus.

D. The decisions below did not depart from the usual course of judicial proceedings.

The Fifth Circuit and district court did not depart from the usual course of judicial proceedings when they held that petitioner was legally barred from bringing this

lawsuit because of the position she took in the Tortious Interference Lawsuit. Petitioner took positions in the two lawsuits that could not be reconciled. By repeatedly testifying under oath that her relationship with respondent was good until third parties interfered, and then asserting under oath in this lawsuit that she was told for years that she was being discriminated against (petitioner refers to this as "compelling direct evidence that [respondent] discriminated against [petitioner] because of both her sex and her perceived disability"), petitioner proffered facts that were wholly inconsistent. (Petition at 14 n. 4).

It is the unique factual assertions made by petitioner that caused the Fifth Circuit to hold that petitioner's discrimination claims are barred by judicial estoppel. This holding is consistent with this Court's holding in *Cleveland,* because petitioner's conflicting factual assertions are not legal conclusions. While it is a mixture of factual assertion and legal conclusion to state "I am disabled for purposes of the Social Security Act" or "I could perform the essential functions of the job with reasonable accommodation," it is purely factual to say "I was terminated because somebody interfered" or "I was terminated because of my sex." Therefore, the Fifth Circuit's holding that petitioner's discrimination claims are legally barred by the doctrine of judicial estoppel is consistent with the appropriate precedent and does not warrant review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARGARET WUESTE LESESNE
Counsel of Record for Respondent
JENNIFER BURR ALTABEF
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 855-3000
Telecopier: (214) 855-1333